

ICHI-BAN PLASTIC (M) SDN BHD v. TENAGA NASIONAL BHD**A**

COURT OF APPEAL, PUTRAJAYA

ZAHARAH IBRAHIM JCA

MOHAMAD ARIFF YUSOF JCA

MAH WENG KWAI JCA

[CIVIL APPEAL NO: P-02(NCVC)(W)-695-03-2013]

B

7 JULY 2014

UTILITIES: *Electricity – Meter tampering – Loss of revenue – Miswiring discovered after meter transferred from appellant’s premises to respondent’s substation – Whether miswiring occurred after detection of tampering – Whether proof on balance of probabilities – Whether miswiring and tampering were two different issues – Whether burden on respondent to prove both liability and quantum of loss of revenue – Damages – Method of calculation – Whether based on assumption – Whether structure of previous monthly billing considered – Electricity Supply Act 1990, ss. 37 & 38*

C**D**

The respondent (“TNB”) filed a suit in the High Court against the appellant for the sum of RM1,065,318.73 for loss of revenue due to the alleged tampering of the meter installation located in the appellant’s premises. TNB’s claim was premised on the offence committed under s. 37(1), 37(3) and 37(14) of the Electricity Supply Act 1990 (‘the Act’). Based on an inspection conducted by TNB on 21 September 2010, a recording error of -36.11% was detected as a result of tampering. TNB recalculated the usage of the electricity and came to an unrecorded figure of RM1,065,318.73 from December 2006 to September 2010. It was observed that the meter cage which was locked could only be forcibly opened by cutting the padlock. The meter was subsequently moved from the appellant’s premises to a TNB substation which was located nearby. No accuracy test was conducted at that time. On 13 September 2011, a miswiring was discovered and it was expressly accepted by the High Court that the miswiring/mistake was done by TNB itself. However, the trial court allowed TNB’s claim on both issues of liability and the calculation for damages payable. It was decided, *inter alia*, that (i) TNB did not have the burden to prove special damages; (ii) the claim was not brought on the basis of contract or tort but was statutory in character, *ie*, it was a claim for loss of revenue under s. 38(4) of the Act; (iii) the claim was one for compensation provided by statute which should be distinguished from a claim for damages; (iv) the measure of the loss given by the plaintiff became a *prima facie* evidence and it was for the appellant to rebut that evidence with acceptable evidence; (v) the appellant failed to produce the production records and purchase orders as well as its audited accounts; (vi) for the allegation of miswiring, the appellant had confused the issue of tampering with miswiring since those were two different issues; and (vii) the miswiring only occurred when the meter was shifted. As for damages, the court relied on the evidence of PW2

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- A and her calculation on the basis of an average and an assumption that the sharp drop in reading occurred in December 2006. This, as alleged, indicated that there was some evidence of tampering. The learned judge also held that TNB's method of calculation for the loss based on "average" as opposed to "percentage of error" was correct. Hence, this appeal.
- B According to the appellant, the learned judge erred when His Lordship failed to consider that the burden of proof placed on TNB should have been proof beyond a reasonable doubt.

Held (allowing appeal; setting aside decision of the High Court)

Per Mohamad Ariff Yusof JCA delivering the judgment of the court:

- C (1) There was no legal requirement for there to be a prosecution and conviction first before a claim for loss of revenue could be pursued. Proof of the commission should be on the lower standard of proof on a balance of probabilities, which is the accepted standard in civil cases even where proof of a criminal act was in issue, except where fraud was alleged. Nevertheless, even on this lower threshold, the claim for loss of revenue was not proved. The miswiring was done by TNB and it was crucial to determine when the said miswiring happened. It could not be proved on the balance of probabilities that the miswiring occurred after the detection of the alleged tampering, namely after the meter was moved from the appellant's premises to the TNB substation. Further, the High Court failed to appreciate the critical significance of this issue by describing the wiring and tampering as two different issues. (paras 14 & 33)
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- E
- F (2) In relation to the seal bits being forged and the manipulation of the metal case housing the metering equipment, the evidence was far from satisfactory. The probabilities did not show that the appellant or any other person had tampered the meter. The evidence provided by TNB was too uncertain and inconclusive. (para 34)
- G (3) It was difficult to support PW2's calculation on the basis periods chosen by her. The averaging was more on the basis of a "guess". There were only 26 billable days in December, as opposed to 37 days for the preceding month of November. Reference was made at the structure of previous monthly billing and as far as 2004, the billable amounts reflected dropped as well as increased over time. As such, the appellant succeeded in rebutting the *prima facie* presumption of loss of revenue despite not producing the production records and the accounts. (para 35)
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- I (4) Whilst the claim under s. 38 of the Act was for loss of revenue as opposed to a prosecution and conviction for the offence of tampering, the ultimate burden was still on the plaintiff, *ie*, TNB to prove both liability and assuming that liability was established, to prove the

quantum of the loss of revenue. The provisions under the Act provided assistance and aid to TNB to prove these elements. However, there were serious shortcomings in the quality of evidence produced at trial. (para 36)

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Case(s) referred to:

Claybricks & Tiles Sdn Bhd lwn. Tenaga Nasional Bhd [2006] 4 CLJ 892 CA (refd)

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Sliney v. London Borough of Haverling [2002] EWCA Crim 2558 (refd)

Sumbang Projek Sdn Bhd v. Tenaga Nasional Bhd [2014] 4 CLJ 323 CA (refd)

Tenaga Nasional Bhd v. Takatronics (M) Sdn Bhd & Ors [2010] 1 LNS 1559 HC (dist)

Tenaga Nasional Bhd v. Ee-Lian Plastic Industries (M) Sdn Bhd [2013] 2 CLJ 697 HC (dist)

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WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC (refd)

Legislation referred to:

Electricity Supply Act 1990, ss. 37(1), (3), (14), 38(1), (3), (4), (5)

For the appellant - Gideon Tan (YJ Yap with him); M/s Gideon Tan Razali Zaini

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For the respondent - Fathima Idris; M/s Idris & Assocs

[Editor's note: For the High Court judgment, please see Tenaga Nasional Berhad v. Ichi-Ban Plastic (M) Sdn Bhd [2013] 1 LNS 389.]

Reported by Kumitha Abd Majid

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JUDGMENT

Mohamad Ariff Yusof JCA:

[1] This was an appeal against the decision of the High Court in Penang which allowed the claim by the respondent/plaintiff ("TNB") against the appellant/defendant ("Ichi-Ban") for the sum of RM1,065,318.73 with costs, for loss of revenue resulting from meter tampering. This was a claim based on s. 38 of the Electricity Supply Act 1990 ("ESA"), in particular s. 38(3) which reads:

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(3) The licensee may require the consumer to pay him for the loss of revenue due to the offence committed under section 37(1), 37(3) and 37(14) and any expenses incurred by the licensee under this section including expenses incurred in respect of the reconnection of electricity supply.

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[2] The legal ingredients of liability under s. 38 are clear. TNB (the licensee) may require Ichi-Ban (the consumer) to pay TNB for the "loss of revenue due to the offence committed" under the subsections specified, ie, s. 37(1), 37(3) and 37(14) of the ESA.

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The Plaintiff's Pleaded Case

[3] On the pleaded case, TNB had based its claim on an alleged tampering of the meter, meaning to say, the claim was latched onto an alleged commission of an offence under s. 37(1), 37(3) and 37(14) reading:

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- A** (1) Any person who **tampers** with or **adjusts** any installation or part thereof or manufactures or imports or sells any equipment so as to cause or to be likely to cause danger to human life or limb or injury to any equipment or other property shall be guilty of an offence and for each such offence shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both.
- B**

(3) Any person who in any manner **dishonestly**:

- (a) **abstracts** electricity;
- (b) **consumes** electricity;
- C** (c) **uses** electricity;
- (d) **alters** the index of **any meter** or **other instrument** used on or in connection with any installation of any supply authority or any licensed installation for recording the output or consumption of electricity; or
- D** (e) **prevents** any such meter or instrument from duly recording the output or consumption of electricity,

shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding three years or both.

- E** (14) Any person who **damages** any meter or other instrument used on or in connection with any licensed installation for recording the output or consumption of electricity shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding two years or to both. (emphasis added)
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[4] The pleaded case of TNB referred to a “pengusikan pada pemasangan meter/meter”. See paras. 6 and 7 of the statement of claim:

- 6 ... pada 21 September 2010, Plaintiff melalui agen/pengkhidmatnya telah melakukan pemeriksaan ke atas pemasangan meter/meter di premis Defendan dalam kehadiran wakil/pekerja Defendan.
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7. Hasil pemeriksaan tersebut, Plaintiff mendapati bahawa terdapat pengusikan pada pemasangan meter/meter seperti berikut:

- (i) kunci mangga meter cage telah dibuka menggunakan master key atau pendua;
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- (ii) paparan meter tidak menunjukkan bacaan arus sebenar bagi fasa merah sebenar kerana nilainya tidak sama dengan nilai yang diambil pada busbar;
- (iii) sil pada TTB adalah palsu setelah membuat perbandingan dengan sil yang asal; dan
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- (iv) link S1 dan S2 bagi fasa merah pada TTB telah dilintar pintaskan dan menyebabkan meter tidak merekodkan bacaan arus sebenar.

The Material Facts

[5] An inspection conducted by TNB on the metering equipment located on Ichi-Ban's premises on 21 September 2010, and in the presence of Ichi-Ban's representatives, indicated an alleged tampering of the metering installation. The meter cage which was locked could only be forcibly opened by cutting the padlock. The inspection indicated an error of reading resulting from the tampering of - 36.11%. TNB thereafter recalculated the usage of electricity and came to an unrecorded figure of RM1,065,318.73 from December 2006 to September 2010. The statutory statement under s. 38(4) and (5) of the ESA dated 19.10.2010 was then served on Ichi-Ban, which offered to settle the underbilling for RM200,000. Section 38(4) and (5), which are commonly referred to in cases of this nature by TNB, read:

(4) A written statement by an employee of the licensee duly certified by the licensee or any person authorised by the licensee specifying:

(a) The amount of loss of revenue or the expenses incurred by the licensee; and

(b) The person liable for the payment thereof,

shall be *prima facie* evidence of the payment that has to be made by the consumer under subsection (3).

(5) The amount stated in the written statement shall, within the period specified in the statement, be due and payable to the licensee and in default of payment such amount shall be recoverable by civil action in a court.

[6] The meter was moved subsequently from Ichi-Ban's premises to a TNB substation nearby. No accuracy test was conducted at that time. A miswiring was discovered only on 13 September 2011. It was not in dispute, and this was expressly accepted by the High Court in its judgment, that the miswiring/mistake was done by TNB itself. This issue of miswiring has been noted earlier above when para. 6 of the statement of claim was referred to. TNB itself had pleaded "(iv) link S1 dan S2 bagi fasa merah pada TTB telah dilintar pintaskan dan menyebabkan meter tidak merekodkan bacaan arus sebenar."

The High Court Decision

[7] The learned trial judge allowed TNB's claim on both issues of liability and the calculation of damages payable. On the issue of liability, the learned judge applied the line of cases which decided that liability based on s. 38 was not dependent on any prosecution being instituted against the customer under s. 37. The High Court applied the decisions in *Claybricks & Tiles Sdn Bhd lwn. Tenaga Nasional Bhd* [2006] 4 CLJ 892 and *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478; [2012] 4 MLJ 301. The High Court held, *inter alia*, that s. 38(1) "was enacted specifically

A for the preservation of TNB's interest" and "empowers TNB to act expeditiously to prevent misuse such as theft of electricity." See the following findings at paras. 16 to 20 of the judgment:

B 16. Accordingly, there is no requirement for a customer to be charged or convicted under s. 37 first before a claim be made by TNB for the loss of revenue.

C 17. Under s. 38(3) the duty to pay for the loss of revenue is on the consumer not the convicted. Prosecution or conviction under s. 37(10) or (13) or (14) is not a prerequisite before a claim under s. 38(3) can be instituted.

C 18. The rationale is that a consumer should pay for the loss of revenue, is because the consumer is the one who has derived the benefit from the unrecorded electricity usage. This subsection is premised on the principle of unjust enrichment.

D 19. Hence, there is no requirement to establish that the defendant was the one who interfered with the metering equipment. All the subsections indicate is that the defendant was the one who had derived benefit and enrichment from the situation.

E 20. Section 37 deals with an offender who tampers with the meter. A consumer is not necessarily the offender. A consumer may be innocent of the tampering act but if a consumer benefited from the tampering he had to pay for the underbilling.

See also para. 23:

F Hence, the defendant's apprehension that 'once the plaintiff's civil claim is allowed, the defendant is effectively found to have committed a criminal offence' is unfounded. Section 38 is only concerned with the state of affairs (ie, facts amounting to the commission of a crime) and is not concerned with the perpetrator or the offender; other sections in the Act deal with this.

G [8] On the issues of proof and quantum of damages claimed by TNB, the learned judge dismissed the argument that TNB had the burden to prove special damages on the facts. The learned judge preferred to accept the argument that here the claim was not brought on the basis of contract or tort, but was statutory in character, ie, it was a claim for loss of revenue under s. 38(4) of the ESA. Quoting, *inter alia*, Halsbury's Laws of England, the court found the claim here to be one for "compensation provided by statute" which should be distinguished from a claim for "damages". Under the ESA, the burden lay on Ichi-Ban to rebut TNB's claim in view of the wording of s. 38(4) whereby "a written statement by an employee of the licensee duly certified by the licensee ... specifying ... the amount of loss of revenue or the expenses incurred by the licensee ... shall be *prima facie* evidence of the payment that has to be made by the consumer ..."

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[9] The learned trial judge found that the legislature had taken cognisance of the fact that in a claim under s. 38(3) “the plaintiff has to work very much in the dark to figure out the loss as all particulars of the actual and real usage of the electricity is with the defendant”, and as such the measure of the loss given by the plaintiff becomes a *prima facie* evidence and it was for the defendant to rebut that evidence with “acceptable evidence”. The court held that Ichi-Ban as defendant had failed to discharge this burden when it failed to produce the production records and purchase orders, as well as its audited accounts.

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[10] The learned judge also held that TNB’s method of calculation of the loss based on “average”, as opposed to “percentage of error”, was correct. The method of calculation as elaborated in court by PW2 (Siti Tafizah binti Tajuludin) was approved. See para. 52 of the judgment:

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52. The defendant’s contention that the calculation of the loss ought to be based on the percentage of error is not correct. PW2 had told the court that the method used was based on average is because the error was completed using a stopwatch (Q & A number 5 of Exh. P4), where is the evidence by the defendant that this method is wrong.

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See further para. 55:

55. The defendant claims that PW2 did not take into account public holidays. The defendant is asking the plaintiff to make the assumption that they were not working on public holidays, which they have shown no evidence of this. It is for the defendant to show evidence whether they were operating on public holidays *et cetera*. It is not for the plaintiff to make assumption on this. The onus is on the defendant to adduce acceptable evidence to contradict the *prima facie* evidence of the plaintiff and mere suggestions in cross examination alone would not suffice. This is in line with section 106 of the Evidence Act.

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[11] The learned judge held, given the circumstances of the case, TNB’s conclusion was a reasonable one and had not been contradicted by Ichi-Ban with acceptable evidence for the court to find otherwise.

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[12] As for the allegation of miswiring, the learned trial judge expressed the view that Ichi-Ban had confused the issue of tampering, found on 21 September 2010, with the issue of miswiring, found on 13 September 2011. See the following passages in the judgment:

36. It is very clear that the defendant has understood that during the shifting of the meter the S1 and S2 wiring in the meter was inadvertently reversed.

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37. What PW1 found was a link in the testimonial block that was connected and after it was opened the meter was back to normal.

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A 38. There was nothing wrong with the meter after PW1 put it back in order and the team left it after the inspection. The miswiring only occurred when the meter was shifted.

39. These are two different issues and the defendant is confusing them.

Our Decision

B [13] This appeal was not directly concerned with the question whether there had to be a conviction before there could be a claim for loss of revenue under s. 38. The memorandum of appeal was not pursued on this basis, but more on the basis that on the pleadings TNB had alleged that
C Ichi-Ban had tampered with the metering equipment, and as such TNB had to prove this allegation before it could succeed in its claim for loss of revenue. According to the grounds, as disclosed in the Memorandum of Appeal, the burden of proof placed on TNB should have been proof beyond a reasonable doubt, and the learned judge had failed to so decide. See paras. 3 and 4 of the memorandum of appeal:

D 3. Yang Arif yang Bijaksana telah terkhilaf dari segi undang-undang dan/atau fakta apabila gagal mengambil kira keterangan yang berkenaan dan memutuskan bahawa Responden telah melepaskan beban bukti untuk menunjukkan bahawa Responden telah mengalami kerugian sebanyak RM1,065,318.73.

E 4. Yang Arif yang Bijaksana telah terkhilaf dari segi undang-undang apabila gagal untuk memutuskan bahawa standard beban pembuktian yang terpakai adalah melampaui keraguan yang munasabah.

F [14] It was therefore, strictly speaking, unnecessary for us to come to a finding on the first-mentioned issue. Nevertheless, we were of the view that given the Federal Court decision in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Berhad*, *supra*, the legal position is clear. Although this Federal Court case concerned an issue of disconnection of electricity supply and in the context of a judicial review application, the same principles should
G apply, in our view, to a case involving a claim for loss of revenue under s. 38(3). There is no legal requirement for there to be a prosecution and conviction first before a claim for loss of revenue is pursued. To this extent, we were in agreement with the finding of the learned trial judge, and disagreed with the other line of cases which required a prior prosecution and conviction, such as *Tenaga Nasional Bhd v. Takatronics (M) Sdn Bhd & Ors* [2010] 1 LNS 1559 and *Tenaga Nasional Bhd v. Ee-Lian Plastic Industries (M) Sdn Bhd* [2013] 2 CLJ 697. To quote the Federal Court in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd*, *supra*:

I [7] At the Court of Appeal the appellant's appeal was dismissed on the ground that the relationship between the appellant and the respondent was purely commercial or contractual. As the relationship came within an environment regulated by private law it was not open to the appellant to challenge the respondent's decision by judicial review, which was a

public law remedy. In dismissing the appellant's appeal, the Court of Appeal relied on *Claybricks & Tiles Sdn Bhd lwn. Tenaga Nasional Bhd* [2007] 1 MLJ 217; [2006] 4 CLJ 892. This case relates to an Erinford injunction application to prevent the TNB from disconnecting the supply of electricity to the plaintiff's premises. Zulkefli Ahmad Makinudin, JCA (as he was then) when dismissing the appeal remarked:

TNB's s. 38 notice to disconnect the electricity supply for offences enumerated in s. 7 need not prove the offences in court. The reason is that, any purported act to review such act will defeat the swift enforcement under the Act where electricity supply needs to be severed immediately to avoid further illegal usage by the perpetrator. The nature of the act taken by TNB arose from a commercial obligation on the part of the consumer rather than TNB's obligation under public law.

[8] Zulkefli Ahmad Makinudin, JCA also elaborated that s. 38(1) of the Act was enacted to give effective powers to TNB to instantly prevent any offence that may be committed and not to be left unattended or unabated. It provided specifically for the preservation of TNB's interest and empowers TNB to act expeditiously, thereby preventing misuse such as theft of electricity supplied by TNB.

[15] It was apparent to us that the Federal Court approved the reasoning of the Court of Appeal in *Claybricks & Tiles Sdn Bhd lwn. Tenaga Nasional Bhd*, *supra*.

[16] More recently, another panel of the Court of Appeal has reaffirmed the correct position in *Sumbang Projek Sdn Bhd v. Tenaga Nasional Bhd* [2014] 4 CLJ 323.

[17] Although we agreed with the finding of the learned judge on the first-mentioned issue on there being no legal requirement for a prior prosecution and conviction under s. 37 before a claim for loss of revenue could be brought under s. 38, we nevertheless allowed the appeal after hearing submissions and considering the totality of the pleaded case and the evidence on record, as against the findings of the learned judge. We were of the considered view that there was a non-direction and misdirection by the learned judge on the facts and the law, although we could not agree with the contention by counsel for Ichi-Ban that the standard of proof for the alleged tampering of the metering equipment had to be proof beyond reasonable doubt. In our view, even on the standard of balance of probabilities, TNB had failed to prove the alleged offence of tampering by Ichi-Ban, as pleaded by TNB, and further, to support and prove the quantum of damages. We could not agree with the broad finding that irrespective of how the case was pleaded, a s. 38 claim could be supported as being premised on the principle of unjust enrichment *simpliciter*. We could not agree that there was no requirement to prove *mens rea* in all situations falling under a s. 38 claim. Much would depend, in our view, on how the case was pleaded and the evidence led both on the issues of liability and quantum of damages.

A [18] We therefore allowed Ichi-Ban's appeal and set aside the decision of the High Court with costs of RM50,000 here and below, to be paid by TNB as respondent. The deposit was ordered to be refunded to Ichi-Ban as appellant.

B [19] The full reasons for allowing the appeal are addressed further below, after addressing and evaluating the respective submissions of the parties.

The Appellant's Submissions In The Appeal

C [20] Ichi-Ban's appeal was premised on two points. These were related to whether TNB had discharged its burden of proof in relation to the alleged tampering and the special damages amounting to RM1,065,318.73 as pleaded. The written submission of Ichi-Ban stated two points in the following terms:

Has the respondent discharged its burden of proof and proved the following:

D (a) The appellant has tampered with the meter in its premise from December 2006 to September 2010; and

(b) If the respondent has succeeded in proving (a) above, the respondents suffered special damages amounting to RM 1,065,318.73 as pleaded in its Statement of Claim?

E [21] In this regard, the High Court decision was said to be based on "manifest error of finding of facts in interpretation of the Electricity Supply Act 1990", and that warranted the intervention of this court.

F [22] Counsel submitted that TNB had expressly pleaded a "tampering" which amounted to an offence under s. 37. Paragraph 9 of the statement of claim, for instance, referred to "terdapat bukti-bukti yang secara munasabah memutuskan bahawa suatu kesalahan di bawah s. 37(1) dan/atau s. 37(3) dan/atau 37(14) Akta Bekalan Elektrik 1990 telah dilakukan pada pemasangan meter/meter milik plaintiff di premis defendan ..." Counsel referred to PW1's evidence which suggested Ichi-Ban could not have accessed the meter since it was housed in a locked metal cage, which had a padlock. The padlock had to be forcibly cut to access the metal cage. The witness could not be sure whether TNB installed the metal cage and padlocked it. This was argued to be illogical, as follows:

H Although under cross-examination SP1 answered that he did not know who put up the meter cage in the Appellant's premises ... the inescapable conclusion to be drawn would be it was the Respondent who put up a cage covering and locking the meter in order to prevent tampering. It would be absolutely illogical that the Respondent would allow the Appellant to put up and lock its own cage at the meter where the Respondent would have no access to the meter. (paragraph 18 of the appellant's Written Submission)

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[23] The evidence also suggested that TNB had a key for the padlock but it could open it. A

[24] On the matter of fake seal bits (pleaded as another proof of tampering), the witness could not again testify for certain that these were fakes, since his conclusion was drawn merely from a visual assessment. There was no technical testing done. The witness could not be sure whether the alleged fake seal bits were installed by Ichi-Ban. B

[25] As regards the evidence of “miswiring”, Ichi-Ban contested the learned judge’s finding that this was a separate issue and Ichi-Ban allegedly was confusing the two issues of tampering, when the metering equipment was in the locked metal cage within Ichi-Ban’s premises, and the issue of miswiring which occurred when the meter was moved from these premises to the TNB substation nearby. Counsel impressed upon us that the miswiring was discovered only on 13 September 2011 when, at all material times, the meter was under the care and supervision of TNB. TNB’s witnesses were unable to confirm when the miswiring happened. The witnesses, who were called on this aspect of the case could not confirm the miswiring could not have happened earlier. They, however, admitted this was a mistake on the part of TNB. The evidence also confirmed the same meter was simply moved from Ichi-Ban’s premises to the TNB substation. See the testimony of PW3 (Abdul Rahman) in cross-examination, which was highlighted to us in the course of submission: C
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Q. Jawapan anda adalah selepas pemeriksaan pada 21 September 2010, pemeriksaan pemasangan meter-meter telah dialih dari meter ke pencawang pada 1 November 2010. Apa maknanya telah dialih meter ke pencawang? Adakah itu mengambil meter keluar dari premis anak guam saya? F

PW3: Ya, kita alih daripada premis ke dalam bilik pencawang TNB."

This point was forcefully argued by counsel in his Written Submission, as follows:

Based on the evidence led at trial, the miswiring could not have happened during the moving of the meter from inside of the premise to the substation because the miswiring is INSIDE the meter itself (not outside the meter) where the Respondent’s witness had confirmed that they merely moved from inside the premise to the substation meaning that everything in the meter was untouched. If that is the case, how could the miswiring happen during the moving of the meter? (paragraph 30 of the written submission) G
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[26] Turning to the issue of proving quantum of damages, counsel argued that the learned trial judge wrongly decided the losses were proven. The judge decided in TNB’s favour despite the witness for TNB (PW2; Siti Tafizah binti Tajuldin) admitting at trial that she based her calculation on an estimation. On the one hand, the error detected when the meter was I

- A inspected showed a recording error of 36.11%, but in calculating the damages suffered by TNB, this figure was not used. Instead, an “average” was used, calculated between the periods December 2006 to September 2010. December 2006 was used as a starting point because of an alleged drastic drop in kwh recorded for that month, despite the evidence revealing that for the month of December 2006 the number of days billed was much less, ie, 26 days compared with 37 days in the preceding month. At para. 35(e) of the written submission, it was argued thus:

- C As demonstrated at trial, SP2 also admitted that she did not take into account the number of days in arriving to her calculation. It is important that as shown in the calculation ..., the number of days billed in November 2006 is 37 whereas the number of days billed in December is only 26. In fact, SP2 agreed to the counsel’s suggestion at trial that the drastic drop was due to the 11 days difference between November 2006 and December 2006.

- D [27] This aspect of the evidence, according to Ichi-Ban’s argument, was not properly addressed by the learned judge.

[28] It was therefore advanced forcefully in conclusion thus:

- E It is abundantly clear from the Grounds of Judgment that the learned trial Judge had made certain errors in the finding of facts and had failed to appreciate the relevant law, i.e. law on proving special damages.

Most importantly, the learned trial Judge had allowed the Respondent’s claim even though its witnesses had testified at trial that the so called “sudden drop” was merely based on guess work and the losses the Respondent claims to have suffered are merely estimation ...

F **The Respondent’s Submissions**

- G [29] On TNB’s part, the arguments were principally premised on the strict wording of s. 38(1), (3) and (4) of the ESA. Emphasising that all that was required under sub-s. (1) was for any person employed by the licensee (TNB) to find “upon any premise” evidence which “in his opinion” proves that “an offence has been committed” under s. 37(1), (3) or (14). TNB submitted there was no requirement to prove *mens rea*. What was required was to prove a “state of affairs” which in the opinion of that person, proved that an offence had been committed. There was no error on the part of the trial judge in this regard since the learned judge had found TNB had met the requirements of s. 38, and was making a claim for loss of revenue.

- I [30] Further, and consistent with s. 38(4), the burden of proof to disprove the written statement of the amount to be paid for loss of revenue lay on Inchi-Ban. TNB agreed with the finding of the learned judge that Ichi-Ban had not rebutted the presumption of *prima facie* evidence under s. 38(4) with acceptable evidence. Ichi-Ban failed to produce the production records and accounts to show otherwise.

[31] As for the standard of proof required to prove both the commission of the offence and the loss, TNB argued it should be on the balance of probabilities. *JW Stupple v. Royal Insurance Co Ltd* was cited as authority. On the absence of a requirement for *mens rea* to be established, TNB's written submission stated:

We submit that "committed" in s. 38(3) ESA is to be understood as meaning that an act has been perpetrated, i.e. the *actus reus* of the offence is proven; there is no requirement for the *mens rea* to be shown

...

[32] To support its argument, TNB relied on the principles established in the English case of *Sliney v. London Borough of Haverling* [2002] EWCA Crim 2558, which was, strictly speaking, an appeal in a trade mark infringement matter, but the English Court of Appeal laid down some general principles on statute being able to shift the legal/persuasive burden to the defendant to rebut a statutory presumption on a balance of probabilities, as well being able statutorily to dispense with proof of *mens rea* or dishonesty.

Analysis

[33] As noted earlier in this judgment, TNB had pleaded there existed "tampering" to the meter. Ichi-Ban contended TNB in fact pleaded it was Ichi-Ban who had tampered with the meter when it was located at Ichi-Ban's premises. On the pleadings, and on the evidence as led by TNB, we were of the view that TNB's case rested on this allegation of tampering by Ichi-Ban, for which Ichi-Ban had to pay for the resultant loss of revenue. With respect, we found there was no proper assessment of the pleadings and the evidence as led by the High Court. We could not accept the unqualified proposition that the claim under s. 38 is grounded on unjust enrichment *per se*. The statutory context makes it clear that there has to be "evidence" that some "offence" has been "committed", although s. 38(1) states a low threshold of proof, ie, the evidence in proof is said to be sufficient "in the opinion" of the person in the employment of TNB who finds the evidence of tampering. Given the statutory formula, we could not therefore agree with the position adopted by Ichi-Ban that it must be proven beyond reasonable doubt that it committed the tampering. The distinction between prosecution and conviction of an offence under s. 37 and a civil claim for loss of revenue under s. 38 arising from the "commission" of an offence under s. 37, as laid down by the line of cases applying *Claybricks & Tiles Sdn Bhd lwn. Tenaga Nasional Bhd, supra*, will be subverted if Ichi-Ban's argument is accepted. Proof of the commission should more properly be on the lower standard of proof on a balance of probabilities, which is the accepted standard in civil cases even where proof of a criminal act is in issue, except where fraud is alleged. Nevertheless, even on this lower threshold, we did not find the claim for loss of revenue proven. In

A particular, there was insufficient attention directed by the High Court to the fact of “miswiring”. It was accepted that the miswiring was done by TNB itself. It was crucial to determine when the miswiring happened - was it before or after the meter was moved from Ichi-Ban’s premises to the TNB substation? We did not find the evidence overwhelmingly in favour of
B TNB. Even TNB’s witnesses could not be sure, and indeed even conceded at one point that it was a mere matter of moving the meter from within the premises to outside it. In our opinion, it could not be proven on the balance of probabilities that the miswiring occurred after the detection of the alleged tampering, namely after the meter was moved from Ichi-Ban’s premises to
C the TNB substation. Further, we believed the High Court failed to appreciate the critical significance of this issue by describing the miswiring and tampering issues as two different issues and Ichi-Ban, as the defendant, was allegedly confusing them.

D [34] On the other issues of the seal bits being forged, and the manipulation of the metal case housing the metering equipment, the evidence was likewise far from satisfactory. The probabilities, in our opinion, did not show tampering by Ichi-Ban, or any other person for that matter. The evidence provided by TNB was too uncertain and inconclusive.

E [35] In regard to the question of damages, we found the arguments advanced by Ichi-Ban convincing. Again, this was a matter of whether sufficient evidence was adduced to rebut the *prima facie* presumption accorded under statute, namely s. 38(4)(b). Ultimately, it was reduced to the veracity of the evidence relied on by TNB’s witness (PW2) and her calculation on the basis of an average and an “assumption” that the sharp
F drop in reading occurred in December 2006, indicating some evidence of tampering. The relevant readings appeared on pp. 120 and 121 of the Appeal Record, Vol. 2(1), Part B & C. We considered this document (“pengiraan bil kebelakangan”) in some detail. We found it difficult to support the witness’s calculation on the basis periods chosen by her. We
G tended to agree with the submission by Ichi-Ban in this regard that the averaging was more on the basis of a “guess”. There were only 26 billable days in December, as opposed to 37 days for the preceding month of November. We looked at the structure of previous monthly billing too, and as far as 2004, the billable amounts reflected drops as well as increases over time. In our opinion, Ichi-Ban had succeeded in rebutting the *prima facie*
H presumption of loss of revenue, despite not producing the production records and the accounts.

I [36] Whilst the claim under s. 38 was for loss of revenue as opposed to a prosecution and conviction for the offence of tampering, the ultimate burden rested still on the plaintiff (TNB) to prove both liability and, assuming liability was established, to prove the quantum of the loss of revenue. The ESA provisions provided assistance and aid to TNB to prove both these

elements, but, with respect, ultimately success or failure must still rest on the state of the pleadings and the quality of the evidence presented by TNB. In our view, there were serious shortcomings in that quality of evidence produced at trial.

Conclusion And Orders

[37] For the reasons stated above, we were of the unanimous opinion that the appeal should be allowed. As earlier stated in our grounds, we therefore allowed Ichi-Ban's appeal and set aside the decision of the High Court with costs of RM50,000 here and below, to be paid by TNB as respondent. We ordered the deposit to be refunded to Ichi-Ban as appellant.

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